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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Implementation of Section 703(e) of the  
Telecommunications Act of 1996

Amendment of the Commission's Rules and  
Policies Governing Pole Attachments

CS Docket No. 97-151

**COMMENTS OF COMCAST CORPORATION, *ET AL.***

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## SUMMARY

Given the growing resistance by diversifying utilities to the deployment of competing telecommunications facilities, the Commission must act now to allow the natural evolution of the broadband communications network to proceed through the overlash of fiber to existing support strand. These rules should prevent utilities from demanding additional compensation, advance permit application or notice for overlashed attachments, none of which are needed for engineering purposes, but all of which are used to handicap competitors and to favor utility affiliates.

The Commission should base its telecommunication pole rate formula on the current formula, adjusting only the usable space figure to match the 16-foot figure now applicable to electric utility poles. The costs of unusable space should be allocated with full recognition of the 1996 Act's command to prevent cross-subsidy and assure imputation. Thus, the electric utility, the ILEC, the telecommunications affiliates of electric utilities, and the video affiliates of ILECs, should all be treated as entities to whom nonusable space should be allocated. Cable operators that overlash their own fiber should continue to be treated as one entity and one attachment, while the overlash of conductors owned by third parties should bear a share of nonusable space. Dark fiber transport provided by a cable operator to a third party is not an additional attachment.

It is impractical and premature to conduct a survey of all entities now attached to poles for use in 2001-2006. However, the Commission's most recent fiber deployment report clearly supports a default presumption of 6 attaching entities (3 in rural areas), which could be rebutted with adequate evidence and procedures which assure that attaching parties have access

to underlying utility records.

The conduit formula should be adjusted to adopt a quarter-duct convention, as described in earlier comments, and to recognize that all capacity, including "reserve," is by definition usable and not subject to the reallocations contemplated by the 1996 Act for aerial support structures.

Rights-of-way cases can best be resolved by adopting explicit principles of timely, open access, consistent with those adopted in the *Local Competition Order*, after which specific controversies may be resolved through the complaint process.

The "telecommunications" services which trigger the differential telecommunications rate do not include high-speed Internet access over cable television systems, which Congress specifically defined to be cable services. When counting attachments for telecommunications services, the accidental transport of encoded, digitized, or encrypted signals downstream from the headend throughout an integrated cable system should not convert every pole into one for which a "telecommunications" rate should apply. When dedicated CAP-style runs cannot be identified, the surcharge should be assessed in the same proportion as there are customers subscribing to the telecommunication service.

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Comcast Corporation, Charter Communications, Marcus Cable Operating Co., L.P., Rifkin & Associates, Greater Media, Inc., Texas Cable & Telecommunications Association, Cable Telecommunications Association of Maryland, Delaware and District of Columbia, and the Mid-America Cable TV Association respectfully submit these Comments in response to the Commission's Notice of Proposed Rulemaking issued August 12, 1997 in the above-captioned proceeding.

**I. ACCESS ISSUES**

As the Commission recognized in the Notice, its mission under the 1996 Act and in this proceeding is to "promote the rapid deployment of competitive telecommunications services."<sup>1</sup> Paramount among the Commission's objectives here should be to ensure that the natural evolution of the nation's broadband communications network be allowed to occur.

Pole owners in recent years have made a practice of attempting to restrain cable

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<sup>1</sup> Notice ¶ 15.

operators' deployment of fiber-optic capacity and non-video uses of pole plant.<sup>2</sup> As electric utilities intensify their diversification into the provision of competing communications services, so too have they intensified their efforts to limit third-party deployment of overlashed fiber. There are no technical differences in the attachments needed for fiber/coax deployed for video and that deployed for telecommunications services; standard outside plant construction practice is to attach each kind of conductor to existing steel messenger cable. Typically, the through bolt and clamp apparatus used to affix the messenger to the pole is the actual piece of equipment in contact with the pole itself.

In order to build upon standard communications industry engineering and construction practices, the Commission must continue to ensure that the broadband network continues to evolve without the disruptions that utilities seek to impose on virtually a daily basis. The Commission should adopt rules ensuring both just and reasonable permitting practices for overlashed attachments, and just and reasonable charges—where applicable—for such overlashes.

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<sup>2</sup> See, e.g., *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099 (1991) *affirmed*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C.Cir. 1993); *Common Carrier Bureau Cautions Owners Of Utility Poles*, Public Notice DA 95-35 (Jan. 11, 1995) ("we are concerned that there could be serious anticompetitive effects from preventing cable operators from adding fiber to their systems"); *Marcus Cable Associates, L.P. v. Texas Utils. Elec. Co.*, PA 96-002, DA 97-1527, 1997 FCC LEXIS 3803 (July 21, 1997) (*application for review* filed Aug. 20, 1997). See also, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, Reply Comments of Continental Cablevision, *et al.* at 8; *Telephone Company -- Cable Television Cross Ownership Rules, Section 63.54 - 63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service*, CC Docket No. 87-266; RM 8221, Pole Attachment Comments of Continental Cablevision, Inc. *et al.* at 17-29 (filed Dec. 16, 1994).

**A. No Advance Permit Application Or Notice Should Be Required**

As cable industry commenters have shown previously, fiber plant is by far the lightest type of facilities affixed to support strand.<sup>3</sup> Fiber conductors most commonly used in cable television construction today (96-strand fiber and smaller) is 0.59" in diameter and weighs 150 pounds per 1000 feet. Even the largest fiber optic trunking cables typically used by cable (216-strand fiber) weigh only 200 pounds per 1000 feet.<sup>4</sup>

A standard hybrid-fiber coax ("HFC") upgrade requires overlashing fiber to existing strand and conductors.<sup>5</sup> Utility pole owners consistently exaggerate the effect of overlashed conductors to prevent the deployment of broadband plant they do not own or directly control. Even though some electric utilities (who themselves are telecommunications competitors) are now requiring cable operators to submit such upgrades for advance utility approval, there is no legitimate engineering or administrative need to do so. As a practical matter, overlashed fiber is virtually never the "straw that breaks the camel's back" by pushing an otherwise compliant pole into violation of applicable loading criteria. If a pole is already in compliance, only in the very rarest of circumstances will the cable television attachment push the pole into violation. Utilities seeking to halt or delay deployment of independent fiber networks would have this Commission believe otherwise.

We expect that some utility commenters will advance horror stories of the

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<sup>3</sup> See, e.g., *Amendment Of Rules And Policies Governing Pole Attachments*, CS Docket No. 97-98, Supplemental Declaration of Nicholas Theroux ¶¶ 4-6, attached to Reply Comments of the National Cable Television Association, *et al.* ("NCTA Reply Comments").

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Id.* ¶¶ 7-12.

occasional broken pole. Of the approximately 900,000 route miles and 25 million fiber miles of fiber optic capacity installed nationally,<sup>6</sup> and the tens of millions of poles deployed, there are—at most—a relative handful of cases where poles are lost. It is doubtful that even these losses may be attributed to the presence of overlashed fiber optic conductors. The rare problems that might be encountered are not sufficient for the adoption of a rule requiring advanced permitting or notice of overlashed conductors.

Overlashing of fiber places no appreciably increased load on the pole, and occupies no greater amount of attachment space that would justify either charging a higher or different rate for such attachments, or otherwise presuming that the presence of an overlashed attachment requires more usable pole space.<sup>7</sup> The purpose of onerous utility permitting requirements is to delay the deployment of independently-owned fiber optic networks, and in some cases, force communications service providers to lease capacity on utility-owned networks.

The issue, therefore, is not whether overlashing presents an engineering threat to pole plant, but whether onerous permitting procedures present a competitive threat to deployment of independently-owned facilities. The Commission, thus, must resolve the question of whether the theoretical possibility that overloaded poles will be damaged merits an across-the-board rule

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<sup>6</sup> Exhibit 1 (study based on FCC 1996 *Fiber Deployment Update*).

<sup>7</sup> In this respect, we note that previous utility arguments owners such as those of Duquesne Light Company made in the *Local Competition* proceeding (which we anticipate the Commission will see again in this proceeding), *see, e.g., Notice* ¶ 18, that loading factors (the weight of the attachments to the pole in *addition* to the space that they occupy) are intended to exaggerate the dangers that overlashed communications conductors to pole-plant integrity. If anything, we believe that because electric attachments are *by far* the heaviest and bulkiest attachments to a pole (in addition to requiring the most attachment and separation space), any rule that attempted to incorporate proportional space *and loading* allocation factors likely would *reduce* the rate paid by communications attachers.

that cable system upgrades and fiber deployment for alternative telecommunications networks should be hamstrung by exaggerated utility claims of threats to the pole plant. We believe that it does not, and urge the Commission to adopt a rule holding that separate contractual provisions attempting to (1) require advance permission for; (2) impose an additional charge for; or (3) otherwise limit cable operators from deploying and using capacity for telecommunications purposes (either by the attaching party or by a customer of the attaching party) should be made unlawful.

Overlashed attachments to existing strand should be routinely allowed, without advance permitting or prior notification to the utility pole owner, and there should be no additional charge for such attachments owned by the cable operator.

## **II. TELECOMMUNICATIONS POLE RATE ISSUES**

The Commission has correctly concluded that the current formula serves as the baseline for calculation of the total pole investment and carrying charges. It has had nearly 20 years of experience in refining the current formula, and it is in the best interests of pole owners, attaching parties and administrative expedience to leverage that experience in developing the telecommunications rate formula prescribed by Congress. The FCC, however, should clarify certain technical issues (not specifically addressed in Docket CS 97-98)<sup>8</sup> relative to translation of elements of the existing formula to the new formula for telecommunications rates.

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<sup>8</sup> See, *Amendment Of Rules And Policies Governing Pole Attachments*, CS Docket No. 97-98, Notice of Proposed Rulemaking (released Mar. 14, 1997).

**A. Usable Space Presumptions**

For the purposes of calculating the maximum telecommunications rate, and for the reasons set forth in NCTA's Comments and Reply Comments in Docket CS 97-98, the existing usable space on telephone poles should continue to be presumptively 13.5 feet, assuming an average pole height in telephone utility inventories of 37.5 feet. The average height of utility poles owned by electric utilities should be presumed to be 40 feet, with usable space of 16 feet.<sup>9</sup>

**B. Apportionment of Unusable Space**

We support the FCC's proposals for counting the number of attaching parties for the purposes of apportioning unusable space,<sup>10</sup> with a small number of refinements.

**1. ILECs Must Be Treated As Attaching Parties For Unusable Space Apportionment**

The Commission has tentatively concluded, correctly, that the exclusion of Incumbent Local Exchange Carriers ("ILECs") from the definition of "telecommunications carrier" under the amendments to Section 224 effected by the 1996 Act was to preserve existing contractual relationships between electric utilities and ILECs. That is why the exclusion is defined to apply to "telecommunications carriers" which would otherwise be subject to the rate formula of Section 224(e), and why that formula addresses allocations among "entities," rather than among "telecommunications carriers." Thus, an ILEC's existing attachment should count as (at least) one "entity" to which 2/3 of unusable pole costs should be directly allocated under

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<sup>9</sup> See, *Amendment Of Rules And Policies Governing Pole Attachments*, CS Docket No. 97-98; NCTA Initial Comments at 10 and Exhibit 3 (filed June 27, 1997); NCTA Reply Comments at 23-24 (filed Aug. 11, 1997).

<sup>10</sup> Notice ¶¶ 22-24.

subsection (e).

When, however, an ILEC installs facilities to distribute video programming, those facilities should be treated as an additional "entity." This treatment is required for two reasons.

First, as a matter of practice, ILECs—notably Ameritech and BellSouth—often install separate strand for their video ventures, 12 inches apart from existing traditional telephone service conductors. The Commission has long held that separately stranded facilities which occupy an additional one-foot of space should be counted as an additional attachment.<sup>11</sup>

Second, the 1996 Act adopts very specific requirements which compel the attribution of additional pole costs to diversified utilities. Section 254(k) of the Communications Act is a blanket prohibition on cross subsidy.<sup>12</sup> Section 224(g) in particular requires imputation of pole rent to utilities which provide telecommunications service or cable services. Unless utilities' separate diversified businesses are treated as independent "entities" that shoulder a proportional share of support space, congressional intent to prevent cross-subsidy and imputation would be thwarted. Only through such apportionment can pole costs be assigned equally—and non-discriminatorily—to attaching parties and to the affiliates of pole owners with which the attaching parties are competing.

## **2. Presumptions For Apportionment Of Unusable Space**

We agree with the Commission as to the likely infeasibility of all utility pole owners' conducting pole-by-pole inventories of the number of entities owning separate

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<sup>11</sup> See, e.g., *Texas Cablevision Co. v. Southwestern Electric Power Co.*, PA-84-0007, Mimeo No. 2747 (February 26, 1985), *review denied*, PA-84 -0007, Mimeo No. 36108 (Aug. 22, 1985).

<sup>12</sup> 47 U.S.C. § 254(k).

attachments on each pole within a given utility's network (although we are aware that some utilities may be attempting to undertake precisely such inventories at this time).<sup>13</sup> We believe that here, as in other discrete elements of the Commission's regulation of pole attachments (*e.g.*, usable space), empirically sustainable presumptions should be used. We believe, furthermore, that because of the significant differences in the numbers of attaching parties in urban as opposed to rural areas, there is good reason to adopt the differing presumptions to account for the greater number of telecom users likely to develop in urban areas. We propose the following approach.

Attached as Exhibit 2 to these Comments is a study derived from the Commission's recently released *Fiber Deployment Update* which shows the number of CLECs or CAPs operating in the top 39 metropolitan statistical areas ("MSA") in the United States.<sup>14</sup> This study, covering markets in which approximately 25% of the population (as of the 1990 Census) resides, also estimates the total number of attaching parties (total CLECs or CAPs + 3 (*i.e.* electric, ILEC and cable TV)) in each of these markets. This study shows that while as of 1996 there are many markets in the top 39 MSAs that only have one or two CLECs or CAPs (but no MSAs with none), some markets (such as New York and Los Angeles) have as many as six and seven CLECs, for a total number of attaching parties in these markets of 9 to 10. The

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<sup>13</sup> Should the Commission determine that conducting a survey would provide for the expedient promulgation of presumptions and regulations, such a survey must include the communications attachments of electric utilities, as well as ILEC facilities used for the distribution of cable television and/or video programming. We submit, however, that such a survey would be of marginal utility if conducted at the present time, or until a time much closer to the beginning of the implementation period for the telecommunications rate because we believe the data will show an upward trend of attaching parties over time. Any survey conducted today would underestimate the numbers of competing facilities-based providers and attaching parties.

<sup>14</sup> Jonathan M. Kraushar, *Fiber Deployment Update End of Year 1996*, Appendix, Industry Analysis Div., Common Carrier Bureau (released Aug. 29, 1997).

average number of CLECs/CAPs in these 39 markets is 4.5, with an average number of attaching parties of 7.5.

We recognize, however, that even in these major market centers not every area of that market will be served by multiple CLECs and wireline video providers, and that there may be some areas that have only three attaching parties: electric, telephone and cable. Because substantial portions of a market may be covered by multiple, non-traditional service providers while others will not, we do not believe it would be accurate today to assume that there are 7.5 attaching parties in all areas of all the top 39 markets. We do believe, however, that because the number of facilities-based providers is growing, and the fact that the data included in this market study does *not* reflect the separately stranded video facilities of ILECs, or the extensive communications networks of power companies, that any attenuation of this presumption be modest.

We also believe that given the fact that the new rates adopted under the new formula will not take effect for more than three years, that there is a substantial likelihood that there will be good reason to increase the attaching party presumptions. Indeed, Exhibit 2 shows that the number of alternative network providers has increased dramatically over the last several years that the Commission has prepared its *Fiber Deployment Update*. The average number of CLECs/CAPs in the top 39 MSAs in 1993 was 3; in 1995 was 3.5 and in 1996 was 4.5. Were this trend to continue (which we believe conservative because it may in fact accelerate), by year-end 2000 (the last year prior to the effective date of the first phase-in year for the telecommunications rate) there will be 6 CLECs/CAPs per-market, or a total of 9 attaching

parties on the poles.<sup>15</sup>

For the time being, however, absent specific and credible rebuttal evidence presented by a pole owner (for which an attaching party such as a cable operator would be granted audit rights outside of the context of any formal rate or complaint proceeding), we believe that it is reasonable (and perhaps even conservative) for the Commission to adopt a presumption that in urban areas there are 3 "new" attaching parties (whether CLECs, ILEC video networks, or power company communications networks) in addition to the three "traditional" attaching parties already on the pole, for a total of 6 parties. Because of the rapid deployment of alternative fiber networks, particularly on the part of the electric utility industry, we believe that this presumption soon may require upward revision.

For rural markets, we believe that it is appropriate to presume that, for the time being, there are only the 3 "traditional" attaching parties, although this situation may soon change.

As to the Commission's proposal that *utilities* determine the number of attaching parties on its poles and submit that data to the attaching party, given the increasingly competitive posture between pole owners and pole tenants, we are concerned that some utilities may have the incentive to understate the number of attaching parties under such an approach in an effort to drive pole rates higher. At a minimum, we believe that the Commission's proposal will work only if the FCC adopts the default presumption suggested here and provides rights of inspection

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<sup>15</sup> The growth from 4.5 CLECs in 1996 to 6.0 in 2000 is derived as follows: between 1993 to 1996 (four years) the average number of CLECs in the top 39 MSAs increased from 3 to 4.5. Exhibit 2. If this trend were to continue over the ensuing four years (1997, 1998, 1999 and 2000) then at the end of the year 2000 there would be 6 (4.5 + 1.5) CAPs/CLECs, for a total of 9 (6+3) attaching parties.

of the underlying information that the utility proffers in support of any position it proposes that is different from this presumption.

### **3. Rate Treatment For Overlashed Facilities**

In keeping with the Commission's commitment to ensuring the continued development of independently-owned broadband networks, it should adopt rules that extend to overlashed facilities its principled approach to pole ratemaking for cable operator and telecommunications attachments. Just as the Commission should adopt an express rule precluding utilities from constraining overlashing through permitting practices, so too should it adopt rate rules for overlashing that, while allowing the pole owner a compensatory rate, do not overcompensate the utility for use of the essential pole resource or establish rates that will hinder the continued evolution of the broadband network.

If a cable operator overlashes a new conductor to an existing strand, and that facility is used for communications over the cable system (*i.e.*, a mixed-use commonly-owned fiber bundle) then there should be no separate charge for that overlashed conductor. The same would be true if the cable operator overlashed a separate fiber which it owned but over which it permitted third-party transport.

Were a cable operator, however, to allow a third party to overlash facilities belonging to that third party, then there would be a separate attachment charge for such attachment. The charge, however, would not be simply a doubling of the applicable telecommunications rate (diluted because of the presence of one additional attaching party on the pole), but rather would be a charge reflecting only the *unusable* space on the pole. Every time any attaching party that has permitted the overlash of a third-party-owned conductor, that

conductor must be counted for the purpose of apportioning unusable pole space. There would be no inclusion of additional *usable* space because there would be no additional space used outside of the one foot allocated to the cable operator. An example may help to illustrate the point.

Assume that a pole has (i) plain (ILEC) telephone attachments; (ii) a CLEC attachment; (iii) an electric-affiliated communications attachment; (iv) electric distribution conductors; and (v) a cable TV strand with third-party-owned overlashed facility. Assume further, that each of the communications attachments occupies one foot of space (with the cable and overlash occupying one foot), for a total of 6 parties on the pole for the purposes of unusable space apportionment. Finally assume that the annual carrying costs of an average 37.5' ILEC-owned telephone pole are \$37.50. Such a pole would contain 13.5 feet of usable space, and 24 feet of "unusable" space. The costs of unusable space would be calculated as follows:  $\$37.50 \times 24 / 37.5 = \$24.00$ . The costs to be allocated are  $\$24.00 \times 2/3 = \$16.00$ . This figure (\$16.00) would be divided by the number (n) of attaching parties (where  $n = 6$ ); [ $\$16.00 \times 1/6$ ] for a rate reflecting only unusable space in the amount of \$2.67.

#### **4. Third-Party Use of Cable Operator Dark Fiber**

In addition to strictly limiting the application of the telecommunications rate to poles used to deliver service to telecommunications end users, the present right of cable systems to transport signals originated by third parties over the system should be retained. As the Commission well knows, cable services consist of a series of channels and services with a widely differing degree of control by the cable operator. For example, local origination programming is obviously produced by, owned by, and distributed by the cable operator. By contrast, must-

carry, public access and commercial leased access services are produced by third parties over which cable has virtually no editorial rights, and distributed by the cable operator.

Cable-system carriage of third-party telecommunications signals is no different. It may be classified as telecommunications for certain purposes, but that does not make it an "attachment" requiring a pole agreement, nor should it make the operator liable for pole rental, any more than a commercial leased access programmer must contract with a utility for pole attachments when sending signals over a cable system attached to that utility's poles.

Thus, rental of "dark fiber" is not an attachment, and should not be restricted. The Common Carrier Bureau has recognized this to be the case in its January 11, 1995 notice concerning abusive utility practices.<sup>16</sup> Commission preservation of this right under the 1996 Act will "promote the rapid deployment of competitive telecommunications services."<sup>17</sup>

#### **5. Separately-Stranded Attachments**

The Commission must ensure that a utility does not attempt to overrecover for pole space, by charging a party twice for multiple attachments properly placed in the communications space on the pole.

To avoid this result, the Commission should clarify that if an entity occupies an additional foot of usable space by attaching two strands 12" apart, that entity may be charged an additional rate, but it may not be charged twice for the same support space. For example, if a CLEC attached two strands 12" apart, it could be charged for 2/13.5 of the cost of the usable

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<sup>16</sup> *Common Carrier Bureau Cautions Owners Of Utility Poles*, Public Notice DA 95-35 (Jan. 11, 1995) ("we are concerned that there could be serious anticompetitive effects from preventing cable operators from adding fiber to their systems").

<sup>17</sup> Notice ¶ 15.

space plus  $2/3 * 1/N$  of the cost of the nonusable space (where N is the number of entities). It could not be charged twice the telecom rate because that would charge twice for the nonusable space.

**C. The Appurtenance Discount Should Be Preserved In The New Telecommunications Rate Formula**

The Commission must ensure that the maximum pole rental rate is calculated with the full appurtenance discount for appliances such as cross arms and other attachments from which cable and communications parties receive no benefit. The net cost of a bare pole for telephone utilities is reduced by 5%, while the net bare pole cost for electric utilities is reduced by 15%.<sup>18</sup> The same calculation must be performed for the telecommunications rate formula.<sup>19</sup>

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<sup>18</sup> On a related note, and as set forth more fully in NCTA's Comments at 24-25, and NCTA's Reply Comments at 29-33 in CS Docket No. 97-98, we continue to oppose the calculation of the pole rate base and applicable carrying charges, on the basis of gross costs. *See, e.g.*, Notice ¶ 34.

<sup>19</sup> For the purposes of this discussion, assume a 37.5-foot electric utility pole which has a net book value of \$117.00 with carrying costs of 37.5%. To calculate the "costs" of the entire pole, the 15% appurtenance factor must be removed from the net book value of the pole. [ $\$117 * 0.85 = \$100.00$ ]. The annual carrying costs for this electric pole are now  $\$100.00 * 0.375 = \$37.50$ . The carrying costs of the usable space are  $(13.5/37.5) * \$37.50 = \$13.50$ . The costs of the unusable space are  $(24/37.5) * \$37.50 = \$24.00$ . It is not clear from the Notice whether it intends—when calculating the cost of the unusable space directly—to remove the proportionate share of the appurtenance from both usable and unusable space. *Compare Notice* ¶ 21 with ¶ 31. If the appurtenance deduction is not taken from the unusable space as it is for the usable space,  $(24/37.5) * \$17.00 = \$10.88$  of appurtenance cost will be erroneously added to the costs of the unusable space.

### **III. DEFINITION OF TELECOMMUNICATIONS FOR POLE RATE PURPOSES**

#### **A. The Telecommunications Rate Should Be Applied Only To Poles Used For The Delivery Of Telecommunications Services To Customers Requesting Such Services**

Telecommunications services transmitted over a cable television system are supplied only to selected customers typically in limited parts of a community. While a competitive access provider ("CAP") might have a direct and easily ascertainable network route, making counting poles for billing purpose a simple matter (*i.e.*, from an IXC POP to an institutional customer), different types of technologies and network architectures can make counting poles more problematic.

The technology and architecture of cable systems can present particular problems relative to implementation of the any differential telecommunications rate. Generally, a cable system is designed to propagate signals from a central headend downstream through the system. If that system is upgraded to deliver telecommunications services as well as cable services, the point-to-multipoint architecture may transmit telecommunications data throughout the entire network, even if that data is digitized, encrypted, blocked or otherwise processed to be unusable to all but the discrete customers to which they are directed. In other words, cable headends may transmit telecommunications signals over all parts of the cable network, irrespective of whether there are customers for those services in the far-flung reaches of the network.

We believe this accident of electron transport should not trigger a different pole attachment rate for all poles across the entire cable system. Any higher telecommunications rate should be applied only to those poles that cable operators *actually use* for the transmission of telecommunications intelligence to customers subscribing to telecommunications service.

Some utilities *already* are informing cable operators, more than three years from the first implementation date of any differential telecommunications rate, that even this accidental propagation of telecommunications data over an integrated broadband cable systems will trigger payment of the telecommunications pole rate on all poles throughout the subscriber network—even if the non-cable signals are directed to only a few customers. This creates a massive barrier (in the form of a dramatic, system-wide pole cost increase) which strongly disfavors the introduction of new services on an integrated basis.

The unfairness and negative policy consequences are apparent when compared to systems that were designed as CAP-like networks (discrete conductors along discrete routes to discrete customers), rather than being integrated into a larger headend-based broadband subscriber network.

We believe that an interpretation of Section 224 that creates a structural regulatory bias in favor of an older technology and discourages the deployment of integrated broadband networks within existing cable networks would be contrary to Congress' express policy to "encourage the provision of new technologies and services to the public."<sup>20</sup>

Theoretically, it might be possible to design a record-keeping system that (1) identifies the exact pole routes (and ownership of each pole) used to reach each customer; (2) tracks the customers who subscribe to telecommunications services offered over cable systems, and "counts" the number of poles "used" to reach that customer; (3) tracks the churn among customers, adding and removing pole counts into the database of poles "used" for telecommunications services, and averaging them properly throughout the pole billing year as

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<sup>20</sup> 47 USC §157(a).

customers add or remove telecommunications services; and (4) places those poles with the proper owners (*i.e.*, electric or telephone utility), as they transfer title to poles among themselves.

We believe that there is a far easier method to use when discrete runs of CAP-style conductors cannot reasonably be identified, which would have particular application to cable-system deployment of telecommunications services.

When poles can readily be counted along dedicated CAP style routes, they should be directly counted. But when specific pole routes cannot be readily identified, poles should be presumed to be used for telecommunications purposes in proportion to the number of subscribers in a system who subscribe to telecommunications services over the cable system. For example, if 10,000 poles are used in 20,000 subscriber system, and 3% of customers take telephony from cable, then 3% of the poles, or 300 poles should be at the telecom rate. The offering of telecommunications service to one customer over a relatively small number of poles should not force cable operators to pay the telecommunications rate for all poles in its system. The telecom rate should apply *proportionally*, according to the relative number of customers actually subscribing to telecommunications services *via* a cable system. The Commission should adopt this method as an administrative convenience of the sort long used in pole attachment cases.

Adoption of such a convention would clearly serve the public interest in administratively-workable pole attachment rules to promote competition over network bottlenecks, and would prevent the charging of what essentially would be unjust and discriminatory pole attachment rates.

**B. The Provision of Internet Services Over A Cable System Is Not A Telecommunications Service And Should Not Be Subject To A Telecommunications Attachment Rate**

While Congress intended to allow utility pole owners to charge a higher rate for poles used for the provision of *telecommunications* services, it clearly did not intend that such rate would apply to Internet services provided over a cable television system.

Section 224 directs that the "traditional" cable television rate is to apply to any pole attachment used solely to provide cable service.<sup>21</sup> The Communications Act is clear that Internet services provided over a cable system are "cable services" within the meaning of the Act. The term cable service means—

- (A) the one-way transmission of (i) video programming, or (ii) other programming service, and
- (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service . . .<sup>22</sup>

"Other programming service," in turn, is broadly defined as "information that a cable operator makes available to all subscribers generally."<sup>23</sup> Congress' addition of the specific reference to subscriber interaction required for the "use" of programming (as explained at page 34 of the Conference Report to the 1996 Act) was intended to:

reflect the evolution of cable to include interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*. This amendment is not intended to affect Federal or State

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<sup>21</sup> 47 U.S.C. § 224(d)(3).

<sup>22</sup> 47 U.S.C. § 522(6) (emphasis supplied).

<sup>23</sup> 47 U.S.C. § 522(14).

regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.<sup>24</sup>

Given the explicit legislative intent to include cable-delivered Internet services squarely within the definition of cable services, it defies logic to argue that Congress intended that such intent would be advanced by triggering a higher pole attachment rate. Because of this clear congressional preference, the provision of Internet and Internet-related services over the capacity of a cable television system should not trigger the telecommunications rate provisions of the 1996 Act.

Moreover, provisions of the Act that generally address cable franchising issues are clear that "any cable system shall not be subject to regulation as a common carrier or utility by reason of providing cable television service."<sup>25</sup> Thus, where a cable operator provides Internet service, which by definition is a "cable service" under the Act, Congress specifically directed that such services *not* be treated as common carrier or utility services.

Further bolstering the fact that the provision of Internet services is not a telecommunications or common carrier service, the Commission has specifically found that the activities of Internet Service Providers ("ISPs") are not telecommunications carriers for the purposes of requiring companies to make contributions to the universal service fund.<sup>26</sup> The reason was simple: to foster the proliferation of Internet-related services with a minimum of

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<sup>24</sup> Cong. Rec. of January 31, 1996, at H1123 (emphasis added).

<sup>25</sup> 47 U.S.C. § 541(c).

<sup>26</sup> Federal-State Board on Universal Service, Report and Order, FCC 97-157, 78¶8 (May 8, 1997).

encumbrances—whether requiring an ISP to contribute to make USF contributions, or, paying a higher pole attachment rate.

For these reasons, the activities of a high-speed ISP utilizing the facilities of a cable system to provide services, fall squarely within the definition of "cable services" under the 1996 Act, and therefore, are subject to the cable services pole attachment rates.

#### **IV. RATE METHODOLOGY FOR CONDUITS**

In the Commission's pending pole attachment rulemaking proceeding, CS Docket No. 97-98, cable operators demonstrated that modern underground engineering and construction practice and the actual physical characteristics of installed conduit plant make a quarter-duct convention a more reasonable approach to calculating conduit rates than the half-duct convention proposed in that proceeding and used in the Wichita case.<sup>27</sup> It was demonstrated there that no duct should be set aside for maintenance, because such duct is in fact used by conduit owners.<sup>28</sup>

Apart from the manner in which innerduct technologies subdivide ducts into a number of different chambers (and how these engineering and physical plant realities be incorporated into the conduit rate formula), the predicate for the Commission's proposal for calculating conduit rentals for telecommunications purposes appears to be mistaken.

The Commission's proposal assumes that whatever duct footage the Commission deems to be "set aside" for maintenance should be deemed unusable within the meaning of the

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<sup>27</sup> *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone*, 11 FCC Rcd. 11,202 (1996); Docket No. 97-98, NCTA Comments at 42-43; Reply Comments at 53-54.

<sup>28</sup> Docket No. 97-98, Comments of NCTA at 43-44. As the Commission has noted, it is not necessary to repeat the evidence that NCTA gathered previously in these Comments. *See* Notice ¶ 8.

pole attachment formula. We believe this to be at odds both with actual use of conduit plant, the statute and Commission interpretations.

First, it has been shown previously that maintenance or emergency duct set asides are rarely if ever accessible by third parties unaffiliated with the owner of the conduit system.<sup>29</sup> The fact, however, that the conduit is unusable to unaffiliated third parties, does not make it unusable to the utility. As has already been shown, this "spare" capacity is routinely used for commercial purposes by the owner of the duct network, and not the unaffiliated licensee. The Commission recognized this to be the case in the NPRM in CS Docket 97-98 by specifically treating "reserved" ducts as usable (at least by the conduit owner and—theoretically—by the attaching party):

The adjustment for reserved ducts element would be the number of reserved ducts that all attachers have the right to use in the event of a cable break or that they otherwise receive benefit from in any other way. If the attacher has no right to use that space or receives no benefit from that duct, we propose that the denominator should not be reduced.<sup>30</sup>

There is no suggestion that this duct is unusable in any way; it could not be useful for maintenance if it were not usable and subject to occupation by wires. The space is held for use (and actually is used) by the conduit owner for maintenance of its own facilities. The very purpose of its existence makes it part of the total capacity, and therefore "usable" within the context of the conduit formula.

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<sup>29</sup> Docket No. 97-98, NCTA Comments at 43; NCTA Reply Comments at 53; Theroux Decl. ¶¶ 2-3.

<sup>30</sup> *Amendment Of Rules And Policies Governing Pole Attachments*, CS Docket No. 97-98, NPRM ¶ 45.